No. 92-94

In The

Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY AND SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

BRIEF *AMICI CURIAE* OF THE CHRISTIAN LEGAL SOCIETY, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE FIRST LIBERTY INSTITUTE, THE LUTHERAN CHURCH-MISSOURI SYNOD, THE NATIONAL ASSOCIATION OF EVANGELICALS AND THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA, IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTERESTS OF AMICI CURIAE

The particular statements of interest of the *amici curiae* are included in Appendix A. The letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

REASONS FOR GRANTING THE WRIT

I. Summary of Argument

Although the Petition primarily presents a Question framed in terms of the Establishment Clause of the First Amendment, *amici* wish to point out that the case in fact presents intertwined questions under both the Free Exercise and the Establishment provisions of the Religion Clause, and the relationship between the two. The court below held that for the school district to provide a sign language interpreter to a student in a religious school would violate the Establishment Clause, that to refuse such an interpreter would burden the rights of the student and his parents under the Free Exercise Clause, and that this prima facie violation of the Free Exercise Clause was justified by the school district's compelling interest in avoiding a violation of the Establishment Clause. In other words, the Establishment Clause means the opposite of the Free Exercise Clause, and the Establishment Clause predominates where there is a conflict. The purpose of this brief is to explain why the effect of the decision below is to violate petitioner's Free Exercise rights, and to urge this Court to adopt a construction of the Establishment Clause that makes the two components of the Religion Clause of the First Amendment harmonious and internally consistent. Recognition of the

complementarity of the two provisions of the Religion Clause is indispensable to the fulfillment of its singular purpose: protection of the Divinely-conferred, inalienable right to religious exercise. *See Declaration of Independence*, 1 Stat. 1 (1776); J. Madison, *A Memorial and Remonstrance* (1785), para. 1, reprinted at 330 U.S. 1, 64 (1947).

Petitioners have primarily presented the Establishment Clause question to this Court. That question deserves review by this Court, because it is fundamental to the meaning of the Establishment Clause, because it is important to the administration of a federal statute, and because the decision below appears to conflict with this Court's decisions in *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), *Mueller v. Allen*, 463 U.S. 388 (1983), and *Board of Education v. Everson*, 330 U.S. 1 (1947).

These *amici* believe that the Establishment Clause question cannot be separated from the Free Exercise Clause question, and certainly not from the question about the relationship between the two clauses. See Petition for Certiorari at 9-10 and note 9, arguing that the judgment below inhibits religion in violation of the Establishment Clause and expressly discriminates against religion in apparent conflict with this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* is not cited below, perhaps because briefing was completed before *Smith* was decided. Petition at 4.

Assuming that there were some plausibility to the lower courts' fear of an Establishment Clause violation, the ultimate question would be whether avoidance of an Establishment Clause violation justifies a Free Exercise

Clause violation. If the conflict were truly unavoidable, it would be equally logical to hold that avoidance of the Free Exercise Clause violation justifies the Establishment Clause violation. The decision below appears to assume, without analysis, that the Establishment Clause is a trump card that overrides other First Amendment rights. That holding conflicts with the decision *en banc* in *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992), and is in tension with this Court's decisions in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Widmar v. Vincent*, 454 U.S. 263 (1981).

In this case, as in *Mergens and Widmar*, the Court must construe each clause of the First Amendment in light of the others. When a court finds a direct conflict between the clauses, as in the court below, that is a strong warning that one of the clauses has been misinterpreted. This Court must consider the Establishment issue in light of the Free Exercise issue and the larger issue of the relationship between the two components of the Religion Clause. Given the importance of these questions, and the significant impact on the religious liberty of all disabled children and their parents, *amici* believe that this Court should grant review.

II. The Court Should Decide Whether the District's Policy Violates the Free Exercise Clause.

A. The District's Policy Expressly Discriminates Against Religion.

Respondent is candid about its decision to discriminate against religion – it admits that if James Zobrest's parents "enrolled him in a non-sectarian private school or

public school" it would provide a sign language interpreter for him. *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d 1190, 1192 n.1 (9th Cir. 1992), Pet. App. A5 n.1. In its decision below, the Ninth Circuit correctly concluded that this discriminatory policy imposes a burden on Petitioners' free exercise of religion. *Id.* at 1196, Pet. App. at A14. Yet the court was singularly unconcerned about the legal implications of a burden on petitioner's constitutional rights. It simply elevated Establishment considerations over Free Exercise rights, without serious analysis of the latter.

It is important at the outset to make clear that these *amici* are not suggesting that the district would be unconstitutionally discriminating against religion if it paid for interpreters in public school but refused to pay for interpreters at any private school. In that case, the distinction would be between public and private, which is a presumptively legitimate basis for distinction. The distinction here is between schools with secular educational content (whether public *or* private) and schools with religious educational content. *That* distinction - a discrimination *against* religion and in favor of the secular - is not permissible.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that although religiously-motivated behavior may be burdened by a "neutral law of general applicability", *id.* at 879, governmental action is subject to the compelling interest test if it overtly discriminates against religion or otherwise falls short of neutrality or general applicability.

In three separate formulations, each approaching the problem from a slightly different perspective, this Court in *Smith* insisted on neutrality and general applicability. First, *Smith* says a law is unconstitutional if it singles out religion for discriminatory treatment. The Court noted that government may not "impose special disabilities on the basis of religious views or religious status." *Id.* at 877. Further, it is unconstitutional for a state to prohibit or otherwise burden certain "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* By its own admission, Respondent is guilty of this forbidden religious discrimination. Although it provides sign language interpreters to hearing-impaired students in public schools *and in private nonreligious schools*, it has refused to provide an interpreter to James Zobrest for one reason only – because his parents have chosen to enroll him in a private religious school. Under *Smith*, such overt religious discrimination is unconstitutional.

Second, a government policy is subject to strict scrutiny under *Smith* if it is "specifically directed at . . . religious practice." *Id.* at 878. For example, a tax on persons who regularly attend church would violate the Free Exercise Clause under this approach, because it is directed at religious practice and therefore is not generally applicable. *Id.* The policy at issue here is economically equivalent to a tax on attending church: the school district imposes a financial forfeiture on those who attend religious schools. The district provides a benefit to disabled children attending private secular schools but withholds that benefit from children attending private religious schools. Both the hypothetical tax and the actual

forfeiture of benefits are economic penalties "specifically directed" at religious practice. Imposing the tax would discourage church attendance; withholding the benefit will discourage enrollment in religious schools. *See* McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U.Chi.L.Rev. 1, 5 (1989). Under *Smith*, these specifically directed economic penalties on religious practices violate the Free Exercise Clause.

Third, *Smith* holds that if a governmental benefit depends upon the actor's motives, religious motives must be included among the motives that qualify for the benefit. 494 U.S. at 884. This was the Court's rationale for reaffirming the line of unemployment compensation cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963).[1] The states in those cases had accepted some reasons for quitting employment, but had denied benefits to persons who had quit for religious reasons. Similarly, Respondent in this case provides an interpreter to students whose families have chosen public education or private nonreligious education, but denies the same benefit to religiously motivated families who choose religious schools for their children. As in *Sherbert*, this policy "forces [Petitioners] to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order [to obtain generally available benefits], on

[1] *Accord, Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); *Thomas v. Review Board, Indiana Employment Security Div.*, 450 U.S. 707 (1981).

the other hand." 374 U.S. at 404. Under *Smith*, this governmental scheme lacks religious neutrality and thus is unconstitutional.

The three formulations are mutually reinforcing elements of the requirement in *Smith* that government be neutral toward religion. A government policy is invalid if it overtly discriminates against religion, if it is "specifically directed" at religious practices, or if it treats religious reasons for acting less favorably than secular reasons for acting. The Respondent's discriminatory policy in this case violates all three formulations of neutrality.

B. The District's Policy Violates the Parents' Hybrid Right to Free Exercise in the Context of Directing the Religious Education of Their Children.

In *Smith* this Court recognized another class of Free Exercise claims that continue to be reviewed under the compelling interest test. The Court referred to these cases as "hybrid" cases involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881. *Smith* says that hybrid claims will be recognized in at least three circumstances: when a Free Exercise claim is linked to a claim based upon the right of parents to direct the education of their children as recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972); when a Free Exercise claim is linked to a Free Speech or Free Press claim; when a Free Exercise claim is linked with a freedom of association claim. *Smith*, 494

U.S. at 881-82. If a Free Exercise claim is combined with a claim arising out of any one of these three categories, the litigant has a hybrid claim and is entitled to strict scrutiny of government actions that burden it. *Id.*

It is clear that if any Free Exercise claim is a hybrid, Petitioners' claim must be one. Their Free Exercise claim is reinforced by: 1) a parental rights claim, 2) the Free Speech claim that the State may not "contract the spectrum of available knowledge"[2] by restricting educational alternatives such as private religious education, and 3) the freedom to choose the classmates and teachers with whom Petitioner James Zobrest will associate during instructional time. Petitioners' claim is a cord of at least four strands, and should be entitled, as a *Smith*-hybrid, to the protection of the compelling interest test.

In *Pierce v. Society of Sisters*, this Court struck down an Oregon law that required most children between the ages of eight and sixteen to attend public school. 268 U.S. at 530-31. The Court held that the Oregon legislation unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. The unanimous opinion of the Court in *Pierce* recognized this parental right to choose either public or private education for their children as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 535. *See also Meyer v. Nebraska*, 262 U.S. 390 (1923). The leading modern case recognizing this parental right is *Wisconsin v. Yoder*, in which the Court noted that the "primary role

[2] *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 406 U.S. at 232.

Smith reaffirmed both *Pierce* and *Yoder* and cited them as examples of hybrid cases in which a Free Exercise claim is linked to a parental rights claim. 494 U.S. at 881. The instant case is a perfect example of this type of *Smith*-hybrid. Petitioners' Free Exercise claim is inextricably intertwined with their claim to direct the education of their children by choosing a private religious school. Respondent's policy of granting sign language interpreters to hearing-impaired children attending public schools or private nonreligious schools, while denying an interpreter to families choosing private religious education, violates Petitioners' hybrid constitutional claim and must be reviewed under strict scrutiny.

Petitioner's hybrid claim is reinforced by free speech and association interests. The sole basis for distinguishing between the school he chose to attend and other private schools, in which he would have received the assistance of a state-funded interpreter, was the content and viewpoint of the speech that takes place at the school. A private school devoted to progressive politics, feminism, militarism, or Afrocentrism would have been approved; a school infused by religious values was not approved. This is a plain instance of discrimination on the basis of the content of speech - indeed, even of the viewpoint of speech. Petitioner's school covered the same *subjects* as schools that would have been approved, but it did so from a different perspective.[3] This Court has

[3] Even religion is deemed to be an appropriate subject for secular curriculum so long as it is presented from the

(Continued on following page)

condemned such content discrimination in the strongest of terms. See *R.A.V. v. City of St. Paul*, No. 90-7675 (June 22, 1992); *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991). This Court has condemned content-based discrimination of speech even when the speech is religious (see *Widmar v. Vincent*, 454 U.S. 263 (1981)) and even when the issue is the grant or denial of subsidies, rather than the administration of regulation. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). *Widmar* upheld neutral access to governmental facilities and resources by non-government speakers. This Court has the same opportunity in the instant case to clarify the complementarity between Establishment and Free Exercise principles in the context of a program providing similar indirect facilitation (equal access to sign language interpreters) of private religious speech.

The instant case also presents the scenario, envisioned by *Smith*, "in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." 494 U.S. at 882. As this Court noted in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984):

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . .

(Continued from previous page)

viewpoint of a dispassionate outsider rather than a believer. *Stone v. Graham*, 449 U.S. 39, 42 (1980); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).

> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.

Id. at 622. *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). By singling out disabled children attending private religious schools for discriminatory denial of benefits, Respondent has infringed Petitioners' hybrid claim. Therefore, Respondent's policy is subject to compelling interest analysis under *Smith*.

III. The Decision Below Elevates the Establishment Clause Over the Rest of the First Amendment, and Thus Conflicts with Decisions of this Court, the Court of Appeals for the Seventh Circuit, and the Congress.

The court of appeals held that the district's policy burdens Petitioner's free exercise rights and that the policy can be justified only by a compelling interest. 963 F.2d 1196-97, Pet. App. A13-A15. It found such an interest in the desire to avoid a violation of the Establishment Clause. *Id.*, Pet. App. at A14-A15. This holding is announced in a single conclusory paragraph.

If we accept the court of appeals' reasoning up to the beginning of that paragraph, a question of exquisite difficulty is presented. The court of appeals held that providing the sign language interpreter prima facie violates the Establishment Clause, and that withholding the interpreter prima facie violates the Free Exercise Clause. What to do in the face of this conflict?

The court of appeals simply picked its favorite clause, and announced that one clause justified a violation of the other. But the court could, with equal logic, have announced that the other clause justified a violation of the first. *See* Laurence Tribe, *Constitutional Law*, Sec. 14-4, at p. 1168 (2d ed. 1988) [arguing that actions "arguably compelled" by the Free Exercise clause "are not forbidden by the (E)stablishment (C)lause"]. The court of appeals apparently assumed that the Establishment Clause is a trump, and that it overrides the rest of the First Amendment.

As it happens, the Seventh Circuit was simultaneously considering a similar issue involving an alleged conflict between the Establishment Clause and the Free Speech Clause. *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992). That court accepted the district court's unappealed judgment that a city had violated the Establishment Clause by endorsing a display of religious paintings in the city park. *Id.* at 617. But it held that this assumed Establishment Clause violation did not justify an injunction overriding the free speech rights of a private association that wanted to display the paintings in its own name.

Judge Easterbrook's concurring opinion captured the essence of the issue most succinctly. *Id.* at 629-30. We draw on his analysis, substituting the facts of this case for the facts of his. This analysis focuses on the relationship among two rules developed by this Court under the First Amendment and a third one added by the Court below:

Rule 1: Under the Establishment Clause, government may not act in a way which has the primary effect of advancing religion.

Rule 2: Under the Free Exercise Clause, government may not single out religion for discriminatory treatment or burden a hybrid claim linking free exercise to another constitutional interest.

Rule 3: (the Ninth Circuit's rule here): To avoid violating Rule 1, government may violate Rule 2.

As Judge Easterbrook stated when discussing this problem in *Doe v. Small*, "the Constitution neither creates nor tolerates Rule 3." 964 F.2d at 629. (Easterbrook, J. concurring).

The Seventh Circuit and the Ninth Circuit could not be further apart on this issue. The Ninth Circuit appears to believe that the constitution grants a position of absolute priority to the Establishment Clause which justifies a violation of the Free Exercise Clause. *Zobrest*, 963 F.2d at 1196-97, Pet. App. A14-A15. *See also Goodall By Goodall v. Stafford County School Board*, 930 F.2d 363, 370 (4th Cir. 1991). In *Doe v. Small*, however, the Seventh Circuit, citing *Widmar v. Vincent*, 454 U.S. 263 (1981), held that the state's obligation to avoid an Establishment Clause violation does not justify restricting the Free Exercise and Free Speech rights of private litigants. 964 F.2d at 618-19. This Court should resolve the split among the circuits by granting Petitioner's prayer in this case and rejecting the Ninth Circuit's rule of absolute preeminence for the Establishment Clause.

This Court addressed similar claims of conflict between the Establishment Clause and religious speech in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Widmar v. Vincent*, 454 U.S. 263 (1981). This Court did not indulge the Ninth Circuit's assumption that one clause of

the First Amendment trumps the others. Rather, in *Widmar* it construed the clauses in light of each other, and held that government satisfies the First Amendment when it treats religion with neutrality, neither discriminating in favor of religion or against religion. *Mergens* and *Widmar* hold that there is no violation of the Establishment Clause when religious speech is given equal access to a public forum, and *Widmar* expressly rejects the claim that a more hostile interpretation of a state establishment clause can be a compelling interest that justifies a violation of the Free Speech Clause. 454 U.S. at 275-76.

This Court has also addressed alleged conflicts between the Establishment and the Free Exercise components of the Religion Clause. The Court rejected the claim that the Establishment Clause precludes exemptions for religiously motivated conduct, *Employment Division v. Smith*, 494 U.S. 872, 890 (1990); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), even though *Smith* interprets the Free Exercise Clause not to require such exemptions.

These cases suggest the proper line of analysis here. Neither of the components of the Religion Clause is a trump card. Instead, the interests on both sides must be weighed with a view toward minimizing governmental impact on private religious choices. In other words, as this Court held in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 (1973), the state must "maintain an attitude of 'neutrality', neither 'advancing' nor 'inhibiting' religion." *See also id.* at 792-93 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.")

A conflict between the Establishment and the Free Exercise provisions is best avoided by holding that government assistance provided on an equal basis to all disabled students (including disabled students enrolled in private religious schools) does not violate the Establishment Clause. The Establishment Clause issue is adequately set forth in the Petition for Certiorari, and we will not review the whole argument here. We would emphasize two points. First, the Establishment Clause issue is virtually indistinguishable from *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). The biggest difference between the cases makes this one even simpler: Witters sought religious training for employment as a minister, but Petitioner here received education in secular subjects that satisfied the state's compulsory education requirements. Second, in *Witters* and *Mueller v. Allen*, 463 U.S. 388 (1983), this Court relied on the fact that direction of public funds to a religious school depended wholly on the private choices of individual students and their parents. That is also true here. The state's check might have gone directly to the interpreter instead of to the parents, as the court of appeals emphasized, 963 F.2d at 1195, but that is an irrelevant formality. The important point is that the state does not choose the school. Petitioners' choice of a religious school was wholly private.

But even if this Court concludes that such even-handed aid advances religion, it is our position that the advancement is incidental, at most *de minimis*, and is outweighed significantly by Petitioners' free exercise interest. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993,

1011-18 (1990). Because the Congress has determined that all hearing-impaired students (of whatever faith and whether they attend public or private school) are entitled to an interpreter, it is impossible for the government aid to influence anyone's private choices concerning religion. The aid merely eliminates the cost of the interpreter as a factor in choosing where to attend school. It reduces the effect of disability as a constraint on free choice. However, Respondent's decision to deny interpreters to children attending private religious schools, while providing interpreters to children attending public or private nonreligious schools, sharply discourages religion in violation of the Free Exercise Clause. *See* McConnell & Posner, *supra*, 56 U.Chi.L.Rev. at 5 (observing that religious behavior contracts when government subsidizes substitute activities).

To summarize our analysis, by providing interpreters only to children attending nonreligious schools, the district has created a substantial disincentive for parents to choose religious education for hearing-impaired children. However, extending benefits to all hearing-impaired children has, at most, a *de minimis* effect on the religious choices of parents. It follows, therefore, that the Free Exercise burden in the instant case outweighs the Establishment Clause interest, and that the district is without a compelling justification for its discriminatory policy.

Even assuming *arguendo* that Respondent has a compelling interest in avoiding a mistaken perception of a symbolic endorsement of religion, it has not narrowly tailored its policy to achieve that interest without unnecessarily burdening Petitioners' constitutional rights. For

example, Respondent could eliminate any mistaken perception of endorsement by disclaimer and by explaining our society's commitment to equal educational opportunity and religious tolerance to students and parents through announcements, memoranda, and posted notices. Therefore, there was no need to adopt the more restrictive alternative of denying much needed assistance to handicapped students enrolled in private religious schools. The Ninth Circuit's cavalier attitude toward this Court's least restrictive means test is yet another reason why this case merits review.

Finally, respondent's asserted compelling interest also contradicts and frustrates the clear policy of Congress to assure the educational needs of *all* handicapped children, including specifically handicapped children "who are enrolled in private elementary and secondary schools." 20 U.S.C. §§ 1400 (Pet. App. A37), 1413(a)(4)(A) (Pet. App. A51); 34 C.F.R. §§ 300.341(b) (Pet. App. A97), 300.347 (Pet. App. A102), 300.348 (Pet. App. A103), 300.401-300.480 (Pet. App. A103-A105); and 34 C.F.R. §§ 76.650-76.662 (Pet. App. A67-A71). The Ninth Circuit was far too quick to usurp the prerogatives of coequal branches of the national government by brushing aside these carefully formulated policies of Congress and their implementation by the Executive Branch.

CONCLUSION

For many years, the jurisprudence of the Religion Clause has been plagued by a "tension" between the interpretation of its two components. *See Thomas v. Review Bd.*, 450 U.S. 707, 720-22 (1981) (Rehnquist, J., dissenting). This case is a textbook example. The court of appeals and the State of Arizona seek to protect the "separation between church and state" by discriminating against a deaf boy on account of his family's religious choices, thereby creating a clear conflict with the Free Exercise Clause. This makes nonsense of the work of the framers, which was to provide a coherent and comprehensive protection for religious freedom against the dangers of both a hostile state and an established church. This case presents an ideal opportunity for this Court to resolve the "tension" between the clauses and restore the First Amendment to a consistent and harmonious whole.

For all of the foregoing reasons, *amici* urge the Court to grant the Petition.

Respectfully submitted,

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APPENDIX A

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about our First Freedom, it founded the Center for Law & Religious Freedom in 1975 to protect and promote the religious liberty of all persons through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated for the free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination or preference on the basis of religion.

The Christian Life Commission is the moral concerns and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with over 15 million members in nearly 38,000 local churches. The Christian Life Commission also has an assignment from the Convention to address matters of religious liberty.

The Church of Jesus Christ of Latter-Day Saints ("the LDS Church") is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 7 million with more than 17,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what

they may." Article of Faith No. 11, The Church of Jesus Christ of Latter-Day Saints.

First Liberty Institute [FLI] at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty - rights, responsibilities, and respect - as common core values essential for good citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eleventh largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 1,000 elementary and secondary schools situated in most of the states of the United States. The Synod, on behalf on its congregations, schools, and individual members, is concerned with situations in which individuals' freedom to exercise their religious preference and parents' rights to direct the religious upbringing and education of their children are infringed, such as in the instant case.

The National Association of Evangelicals [NAE] is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74

denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The National Council of the Churches of Christ in the USA is a community of communions composed of thirty-two national religious bodies, Protestant and Eastern Orthodox, having an aggregate membership of more than 40 million adherents in the United States. It is governed by a board of some 260 members selected by its member communions in proportion to their size and support of the Council. The Council does not claim to speak for all of its adherents but seeks to carry out the wishes of their representatives as expressed in the polices they adopt through the General Board.

Among these policies was a historic resolution "On Federal Aid to Education" that helped to shape the "church-state settlement" that made possible the enactment of the Elementary and Secondary Education Act of 1965. It endorsed the "child-benefit" theory underlying *Everson v. Board of Education* (1977), thus permitting certain kinds of aid to flow to children attending parochial schools. That Act was amended in committee to incorporate certain restrictions designed to insure that the aid benefitted *children* rather than the *schools* they attended. Those amendments were informally referred to by members of Congress as the "Flemming Amendments" because they were suggested by the President of the NCC, Arthur C. Flemming, in testimony based on this resolution.

The limitations in the resolution, designed to keep the "child-benefit" concept from being completely open-ended, were as follows:

1. That benefits intended for all children be determined and administered by public agencies . . .

2. That such benefits intended for all children not be conveyed in such a way that religious institutions acquire property or the services of personnel thereby.

3. That such benefits not be used directly or indirectly for the inculcation of religion or the teaching of sectarian doctrine; and

4. That there be no discrimination by race, religion, class or natural origin in the distribution of such benefits.

The relief sought in this brief would seem to meet these criteria, with the possible exception of No. 3, which would stipulate that the sign-language interpreters supplied by the public school district not be involved in the teaching of religion.